

THE SHERIFF FOR ZIMBABWE
versus
LARJOH MARKETING (PVT) LTD
and
CONSTANTINE DINHA
and
RICHARD MANZAI
and
MARTIN GWEZERE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 9 November 2016 and 10 May 2017

OPPOSED MATTER

F Chikwamba, for the applicant
No appearance for the claimants
No appearance for the judgment creditor

CHITAPI J: This is an application for an interpleader. When the matter was called Miss *Chikwamba* for the applicant moved the court to determine the application on the papers. She indicated that the claimants and judgment creditor's counsel who were not present had agreed on such a course. I proceed to do so.

The judgment creditor obtained in case No HC 3888/15 an order in this court on 20 May, 2015 against Friendly Environmental Services (Pvt) Ltd registering an arbitral award in his favour for payment of US\$14 900-00 in benefits and outstanding salary granted by an arbitrator. The court order aforesaid was one registering the arbitral award for purposes of execution and enforcement. The court reference number for the order of this court is HC 3888/15.

On 1 June, 2015, the judgment creditor caused the issue of a writ of execution out of this court in terms of which the Sheriff (applicant herein) was required and directed to attach and take into execution the movable goods of Friendly Environmental Services (Pvt) Ltd (hereinafter

called judgment debtor) and to realise the amount of the arbitral awards and ancillary costs. The sheriff was directed to levy execution at No 12 Kelvin Road North, Graniteside, Harare.

Acting under the powers reposed in him by the writ of execution, the applicant proceeded to attach and placed under judicial attachment three motor vehicles, *viz*, registration numbers ABR 1258; ABG 5526 and AAH 3306. Following on the attachment, one Sikhumbuzo Mpofo who described himself as “the nominate provisional judicial manager” for the judgment debtor challenged the attachment and deposed to an affidavit on 30 March, 2016 in which he swore that the attached vehicles did not belong to the judgment debtor. He indicated further therein that the three vehicles were subject of claims against the judgment debtor (under judicial management) by their owners namely Larjoh marketing (Pvt) Ltd which claimed motor vehicle registration No. ABR 1258; Constantine Dinha who claimed motor vehicle registration No ABG 5526 and Richard Manzai who claimed motor vehicle registration No AAH 3306.

At the time that the said Sikhumbuzo Mpofo challenged the attachment, he indicated in his affidavit that he still awaited to be issued with letters of appointment or administration of the judgment debtor by the Master of this court. He further indicated that he did not have any other interest in the matter save the protection of the judgment debtor in the course of discharging his mandate. He therefore requested the applicant to issue interpleader proceedings so that the claimants would prove their claims. In the alternative he deposed that if execution were to be proceeded with, security commensurate with the value of the attached vehicles be furnished so that in the event that the three parties who were claiming the vehicles from the judgment debtor were to succeed, the judgment debtor would be indemnified from liability to compensate the said parties.

Faced with the adverse claim as aforesaid, the applicant instituted this interpleader application pursuant to order 30 r 207 in which it cited the three parties referred to by Sikhumbuzo Mpofo as the 1st, 2nd and 3rd claimants respectively as well as the judgment creditor in whose favor the writ of execution had been issued. The applicant seeks a determination by the court as to the validity of the claims being made and for any further directives as the court may give. The applicant indicates that he does not collude with any of the parties and will abide such decision as the court will give and act accordingly. In the draft order, the applicant prays for his

costs and for the court to grant them on the scale it considers proper as against the judgment creditor if the application succeeds or against the claimants if the application is dismissed.

The judgment creditor opposes the application on three grounds and has set out the grounds in an affidavit deposed to his legal practitioner Mr *Kumbirai Masasire*. The grounds are technical or procedural in nature. They may conveniently be summarized as;

- (1) That the applicant has no basis for instituting interpleader proceedings because the claimants did not place evidence in the form of affidavits deposed to by the claimants asserting and proving their claims.
- (2) That Sikhumbuzo Mpofu lacked capacity to represent the judgment debtor because he had not been appointed as judicial manager by the Master of this Court and further he was not registered with the “Estate and Administration Council” (sic) and did not have a practising certificate. It was also contended that Sikhumbuzo Mpofu could not purport to represent the claimants and at best, barring his lack of *locus standi*, could only represent the judgment creditor. The legal practitioner aforesaid further deposed that apart from Sikhumbuzo Mpofu not being known to the Master’s Office, he could not purport to represent the judgment debtor which was not cited as a party to the interpleader application.
- (3) That there was no evidence attached by the claimants to sustain their claim to ownership of the attached property.

The first and second grounds of opposition dove tail. As I understand the legal practitioners’ affidavit, he basically opposes the applicant on of both procedural and substantive grounds. He attached to his affidavit, copy of a letter from the Master’s Office dated 29 March, 2016 addressed to the Judgment Creditor’s law firm. The content of the letter is to the effect that as at the date of the latter, there was no record of the judgment debtor being listed as a company under provisional or final judicial management. The judgment creditor’s affidavit was filed on 21 April, 2016. The application was served on the judgment debtor’s legal practitioners on 13 April, 2016.

The application was served on the 1st claimant on 13 April, 2016; on the 2nd claimant on 15 April, 2016 and on the 3rd claimant on 12 April, 2016. The 1st, 2nd and 3rd claimants filed their joint notice of opposition and opposing affidavits on 27 April, 2016. The claimants attached

documents to support their claims. In the case of the 1st claimant it attached copy of letter from Hino, a Division of Amtec Zimbabwe dated 3 March, 2016 confirming that Truck Registration No ABR 1258 had been surrendered to the 1st claimant in a set off deal for an amount due to the 1st claimant. There is no mention of the 1st claimant in the deal. With respect to the second applicant he attached copy of a Central Vehicle Registry Extract of records showing that pick-up truck registration No. ABG 5526 was registered in the name of the second applicant following importation from South Africa, for which duty was paid with the registration having been effected on 31 December, 2008.

The third applicant attached to his affidavit to support his claim copies of the sale agreement, when he purchased the vehicle, the vehicle registration book in his name for vehicle registration No. AAH 3306 and an acknowledgement of payment for the purchase of the vehicle on 2 February, 2015. The vehicles according to the applicants were being required by the judgment debtor or hired to it in the case of the third vehicle.

Parties then filed heads of argument. I must note that the documents of proof of claims to the vehicles deposed to by the three claimants were not disputed by the judgment creditor. I have no reason to dismiss the claimants' assertions to the vehicles. This disposes of the judgment's objection that the claimants did not file any proof of ownership to the vehicles. They did so after they had been served with the interpleader application. They however, did not do so prior to the applicant filing and serving this application. It appears to me that the judgment creditor faced a procedural handicap which was however not insurmountable. He filed a notice of opposition before the claimants had filed their notices of opposition. He could only file a further affidavit with the leave of the court or judge. Had he wanted to impugn the claimants' affidavits and documents which were filed after he had filed his own opposing affidavit, he should have utilized the provisions of r 235 see the Sheriff of the *High Court v Glaneg Investors (Pvt) Ltd & Ors* HH 17/16. Having accepted that the claimants' evidence of claim to ownership of the vehicles was not impugned nor disputed in any material in particular, the application crystallizes itself to the procedural objections regarding the *locus standi* of Sikhumbuzo Mpofo and the alleged lack of admissible material on which the applicant relied to file for interpleader.

I do not consider that it is necessary for me to ventilate the issues raised by the judgment creditor regarding the *locus standi* of Sikhumbuzo Mpofo to represent and/or speak for either the

judgment debtor or the claimants. It is also not in my view necessary to ventilate the issue of whether or not the judgment debtor was proven as having been under provisional liquidation. These issues are nonetheless not inconsequential. I however determine the matter from a different angle based on the interpretation that I ascribe to r 205 as read with r 205 A.

In terms of r 205, an applicant is defined as *inter alia* a person who holds property. In this case, the Sheriff for Zimbabwe consequent on the attachment of the vehicles became the holder of the vehicles pending their sale in execution. Rule 205 A (1) reads as follows:

“205A. Interpleader notice – conflicting claims.

- (1) Where any person alleges he holds any property or is under any liability in respect of which he or expects to be sued by two or more persons making adverse claims in respect of the property or liability, he may deliver to the claimants a notice and an affidavit setting out the matters referred to in rules 207 and 208 respectively.
- (2)

Rules 207 and 208 details the contents of the interpleader notice and require the applicant of depose to an affidavit in which the applicant must confirm his impartiality in the matter, that he does not support or conclude with any of the claimants and the applicants’ willingness to abide the courts directive.

Upon a proper reading of r 205A, the person who holds the property only needs as in this case to act upon an expectation that he may be sued by a person making an adverse claim in regard to the property held. He does not have to himself determine the veracity or otherwise of the adverse claim which he expects may be made. The person holding the property can therefore act on any reasonable information short of intuition or instinct from which he forms the belief, assumption or supposition that he may be sued by two or more persons making adverse claims. It must be noted that the rule is number specific that the expectation should be that of being sued by two or more persons (not one person).

It does not appear to me that it is a matter of any great moment, the fact that the information from which the applicant herein acted came from a person lacking *locus standi*. The source of the information is not material. I say so because r 205 clearly does not require the person holding property to interrogate the authenticity of the source of information from which he forms an expectation that he may be sued. Had the rule maker intended that the person holding property should first of all interrogate the reasonableness of his expectation, the rule

should have provided so. The rule is designed as a buffer or barrier to a possible multiplicity of claims against the holder of property arising from third parties who may lay claim to the property held. The court is called upon at an early stage to give a determination on whether or not the property held can be dealt with in the manner proposed, as in this case, a sale in execution.

Claimants counsel in their heads of argument referred to two decisions of this court namely *Phillips N.O v National Foods and Anor* 1996 (2) ZLR 532 (H); *The Sheriff of the High Court v Orimbahuru Holdings (Pvt) Ltd & Anor* HH 128/16. The decisions underline the principle that a claimant in an interpleader application is required to set out facts and allegations including producing documents tending to prove the claimant's claim to ownership of the property attached. I would in brief state that the decisions do no more than underscore the principle that he who avers must prove. This of course is the well-known and correct principle of procedure and incidence of onus, generally speaking. I have already indicated that the judgment creditor did not impugn the claimant's claim to ownership. Where an allegation is made and not controverted, again generally speaking, it is taken as admitted.

Counsel for the judgment creditor also cited a number of cases on the burden of proof in interpleader pleadings. Reference was made *inter alia* to the case *Sheriff of High Court v Tiritose Consulting Pvt Ltd and Formscaff (Pvt) Ltd* HH 347/15 to the effect that "it is trite in our law that the claimant bears the onus of proving ownership of property claimed in inter-pleader proceedings". The parties' counsels are therefore agreed on the law. The problem faced by the judgment creditor is that his counsel seeks to challenge the veracity and authenticity of the claimant's evidence of ownership in heads of argument. Heads of arguments cannot take the place of opposing evidence. They are not evidence but submissions on facts and law arising from the filed pleadings. Heads of argument do not constitute a record of the *facta probanda* in a case. The claimant's evidence therefore stands unchallenged despite attempts to do so by the judgment creditor's legal practitioners in heads of argument. The application must therefore succeed in terms of the main relief sought by the applicant.

The last issue concerns costs. The claimants counsel properly submitted in the heads of argument that costs in interpleader proceedings are in the discretion of the court see *Deputy Sheriff v Willowvale Mazda Motor Industries (Pvt) Ltd & Anor* 2001 (1) ZLR. The claimants seek costs on the legal practitioner and client scale. The applicant seeks costs and charges which

he has incurred. The applicant is entitled to his charges and costs these being a claim which he may lawfully claim and be granted in terms of r 208 (a). The applicant acted under a writ issued by the court. In the discharge of the writ he came across information tending to show that the property he had attached could be subject to adverse claims by more than one person. He decided to exercise caution and instituted proceedings for interpleader. As it turned out, the applicants' apprehension was not in vain. Indeed three claimants filed claims which the judgment creditor did not dispute save to raise a technical objection through his legal practitioner. The objection was dismissed. The applicant acted properly and reasonably with justification.

I have agonised over the issue of the level of costs sought by the claimants. I do not agree that the judgment creditor's action has led to the claimants incurring unnecessary costs. The claimants accept that their properties were in the hands of the judgment debtor on attachment by the applicant. It was not alleged that the judgment creditor was aware at the time of attachment that the attached property belonged to third parties. The judgment creditor made investigations with the Master's Office to establish whether the judgment debtor was under provisional liquidation. The response from the Master was that the Master did not have any record of the judgment debtor being under liquidation. The judgment creditor was therefore justified to impugn the *bona fides* and authenticity of the affidavit of Sikhumbuzo Mpofu.

Strictly speaking, the judgment creditor is really not a player in an application under r 205A save as an interested party who must be served with the application in terms of r 226 (1) (a). I say so because in terms of the writ of execution issued by the court, it is not the judgment creditor who directed the applicant to attach and take into execution the judgment debtor's movable property. The judgment creditor does not have such authority at law or power. The applicant acts on the directive and authority of the court. The applicant is the one who has a duty to establish and satisfy himself that the goods he has attached belong to the judgment debtor. Rule 205A exists as I have indicated to assist the applicant through the court not to burn his fingers by attaching and executing on property which does not belong to the judgment debtor thereby exposing himself to adverse claims. It is not a coincidence that there is no mention of the judgment creditor in rr 205-210. It is because the judgment creditor *stricto sensu* has no role to play other than being a player on the periphery. The fact that the judgment creditor opposed the application does not in this application justify penalizing him with punitive costs. The reasons

for ordering costs against the judgment creditor lies in that it is within his power to withdraw the writ by instructing the applicant to do so. It is the judgment creditor who sets the wheels of enforcement of the judgment into motion. Therefore, where the writ has ended in litigation as in this case, the judgment creditor should bear the costs if the writ is set aside or execution stayed. I will therefore order that costs are paid by the judgment creditor on the ordinary scale.

I dispose the application as follows:

1. The 1st, 2nd, 3rd claimants' claims to motor vehicle registration Nos. ABR 1258, ABG 5526 and AAH 3306 respectively are granted and the vehicles declared not executable in execution of the judgment of this court in case No. HC 3888/15.
2. The applicant shall forthwith release from attachment to the claimants the 3 motor vehicles aforesaid.
3. The judgment creditor shall pay the applicant and claimants' costs on the ordinary scale.

Kantor & Immerman, applicant's legal practitioners
Munangati & Associates, Claimants' legal practitioners
Musoni Masasire Law Chambers, Judgment Creditor's legal practitioners